

**DARBY LUMBER INCORPORATED,**

Appellant

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**AGBCA No. 2000-131-1**

**RULING OF THE BOARD OF CONTRACT APPEALS**

May 3, 2005

**Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.**

**Opinion for the Board by Administrative Judge WESTBROOK. Separate concurring opinion by Administrative Judge VERGILIO.**

The Government has filed a Motion to Dismiss the appeal arguing that the Board's previous ruling, issued October 15, 2003, erroneously conferred standing on Mr. Robert Russell, the principal stockholder of Darby Lumber, Incorporated (Appellant or Darby), to pursue the instant appeal. Familiarity with that ruling, Darby Lumber Inc., AGBCA No. 2000-131-1, 03-2 BCA ¶ 32,399, is assumed. We will not here repeat the underlying factual chronology.

In the present motion, the Government correctly states that a Board majority determined that Appellant, which was involved in bankruptcy proceedings, had standing to pursue this appeal before the Board and that Mr. Russell could continue prosecution of the appeal in the name of Darby. The Government, however, goes on to state that in concluding that Appellant possessed standing, the

Board also conferred standing upon Mr. Russell. The Government explains that the question whether Russell had standing to pursue the appeal was not substantively discussed by the Government in the Memorandum it filed in support of the position it took when the Board *sua sponte* raised the jurisdictional question decided in the October 15, 2003 ruling.<sup>1</sup>

The Government provides no citation to language of either of the separate opinions comprising the majority when it asserts that the Board also conferred standing upon Mr. Russell. Neither opinion contains language which can be so construed. Judge Pollack stated, "Appellant is and remains the corporate entity of Darby" (Pollack opinion, page (p.) 5). He also made clear that "[T]he fact that the [bankruptcy] court specified that Russell was to proceed in Darby's name was recognition that Russell had no independent right to pursue the claim and that the claim had to be pursued through the liquidated corporate entity, Darby (Pollack opinion, p. 7). Judge Vergilio analogized the situation as being "akin to an action by a subcontractor brought in the name and with the authorization of the contractor" (Vergilio opinion, p. 9).

Previous Government counsel's omission to argue against standing by Mr. Russell to any significant degree can be explained by the final paragraph of the Government memorandum in which it is stated that Appellant and the Government are in agreement that Mr. Russell is not a party to the action. In so doing, the Government relied on language in Appellant's response to the original Motion to Dismiss: "[t]he USDA states that 'the appeal of the CO's final decision belongs to Darby Lumber Company' and goes on to allege that 'Mr. Russell lacks standing. I believe that there is no disagreement with either of these assertions.'"

The Government's reliance on Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217 (1998), is misplaced. The Board's previous ruling did not grant standing to Mr. Russell. The majority merely allowed him to bring Darby's claim in Darby's name. The Board's ruling is not analogous to Dalton where a surety sought to pursue an appeal before a board of contract appeals on its own behalf under a theory of equitable subrogation. Similarly, the opposition by Appellant is in error. By no means did the Board, or can the Board, confer the right to pursue an appeal to a party not in privity of contract with the Government. There is nothing in the facts Appellant alleges it can prove that confers a status of contractual privity on Mr. Russell. As indicated above, prior to the Board's previous ruling, both parties had agreed that Mr. Russell lacked standing.

Accordingly, the Board finds no support for revisiting the issue of jurisdiction based on the question whether Mr. Russell possesses standing. My agreement with the majority here should not be

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<sup>1</sup> The lapse of time between that ruling and the current motion is explained by previous Government counsel's change of jobs and the delay in assignment of a new attorney to this appeal. Present counsel is newly assigned and did not participate in previous briefing.

construed as a change from my original opinion as expressed in my dissent to the October 15, 2003 ruling. I continue to interpret applicable precedent from the Board's appellate authority as being that

a corporation in bankruptcy, as distinguished from a trustee in bankruptcy, lacks standing to prosecute an appeal before a board of contract appeals.

**RULING**

The Motion to Dismiss is denied.

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**ANNE W. WESTBROOK**

Administrative Judge

**Concurring:**

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**HOWARD A. POLLACK**

Administrative Judge

**VERGILIO, Administrative Judge, concurring.**

Because I read the Government's motion as seeking to dismiss the appeal as a whole because of Mr. Russell's status (that is, I find the motion to be more encompassing than does the majority), I concur separately.

The Government has filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. With references to Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217 (Fed. Cir. 1998), the Government asks the Board to conclude that because Mr. Russell lacks privity of contract with the Government, he may not pursue this appeal. In conclusion, the Government asserts that the Board lacks subject matter jurisdiction over the entire dispute and "should dismiss Russell's appeal in the name of Darby." (Government Motion at 6.) In response to the motion, counsel for Darby Lumber Inc. and Mr. Russell contends that Mr. Russell is a proper named party to this appeal, that Mr. Russell independently both is in privity of contract with the Government and has standing to pursue this appeal in his own name. In its submissions, counsel has added the name of Mr. Russell as an appellant, to that of Darby Lumber Inc., the sole named party recognized by the Board as a named appellant. In its response to the motion, counsel incorrectly contends that the Government has unilaterally modified the caption of this case to exclude Mr. Russell; the Board's earlier opinion identified Darby Lumber Inc. as the sole appellant. Darby Lumber Inc., AGBCA No. 2000-131-1, 03-2 BCA ¶ 32,399.

Unlike the situation in Admiralty, the contractor (Darby Lumber Inc.) is the party bringing this

appeal; Mr. Russell is not acting alone. With the approval of the Bankruptcy Court (and the trustee), Mr. Russell is pursuing the appeal on behalf of the contractor. Darby may so pursue its appeal under the parameters of statute (the Contracts Disputes Act, 41 U.S.C. §§ 601-613). Contrary to the views provided in opposition to the Government's motion, based upon the existing record and arguments, Mr. Russell has no privity of contract with the Government on this matter, lacks an individual right to pursue the claim alone, and is not a proper named party to this dispute. However, the contractor is the appropriate party to pursue the dispute; Mr. Russell is acting on behalf of the contractor. Because Darby is both the contractor and named party pursuing this dispute, and because the appeal is brought on behalf of (i.e., with the knowledge and approval of) Darby, the Board has jurisdiction. For these reasons, I join the majority and deny the Government's motion to dismiss.

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**JOSEPH A. VERGILIO**

Administrative Judge

**Issued at Washington, D.C.****May 3, 2005**